John S. Delikanakis (Nevada Bar No. 5928)
Joshua D. Cools (Nevada Bar No. 11941)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
Email: jdelikanakis@swlaw.com
Email: jcools@swlaw.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Ilona Harding, an individual; Lester Thomas Harding, an individual, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. Diamond Resorts Holdings, LLC, a Nevada limited liability company; Diamond Resorts International, Inc., a Delaware corporation; Diamond Resorts U.S. Collection, L.L.C, a Delaware limited liability company; Diamond Resorts International Marketing, Inc., a California corporation; Diamond Resorts International Club, Inc., a Florida corporation; Diamond Resorts Management, Inc., an Arizona corporation; Diamond Resorts U.S. Collection Members Association, a Delaware corporation; Diamond Resorts Developer & Sales Holding Company, a Delaware company; Diamond Resorts Financial Services, Inc., a California corporation; and Does 1 through 100, Inclusive, Defendants.	Case No. 2:17-cv-00248-RFB-VCF **DIAMOND RESORTS COMPANIES' MOTION TO COMPEL PLAINTIFFS TO ARBITRATION AND TO STAY OR DISMISS THIS ACTION**

Defendants Diamond Resorts Holdings, Diamond Resorts International, Inc., Diamond Resorts U.S. Collection [Development], L.L.C,[1] Diamond Resorts International Marketing, Inc.,

[1] Plaintiffs have misnamed this defendant; there is no "Diamond Resorts U.S. Collection LLC". Defendants presume that they intended to name the "Diamond Resorts U.S. Collection

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

Diamond Resorts International Club, Inc., Diamond Resorts Management, Inc., Diamond Resorts U.S. Collection Members Association, Diamond Resorts Developer & Sales Holding Company, and Diamond Resorts Financial Services, Inc., (also collectively referred to in this motion as "Diamond Resorts Companies" or "Diamond"),[2] by and through their counsel, Snell & Wilmer L.L.P., submit this **MOTION TO COMPEL PLAINTIFFS TO ARBITRATION AND TO STAY OR DISMISS THIS ACTION** ("the Motion").

DATED this 3rd of April, 2017.

SNELL & WILMER L.L.P.

By: /s/ John S. Delikanakis
John S. Delikanakis
Nevada Bar No. 5928
Joshua D. Cools
Nevada Bar No. 11941
3883 Howard Hughes Parkway, Ste. 1100
Las Vegas, NV 89169

Attorneys for Defendants

Development, LLC", which is the entity with whom they entered into the operative purchase agreement.

[2] The Diamond Resorts Companies named in Plaintiffs' complaint are a variety of Diamond entities, including holding companies, most of which are not proper defendants to the claims raised by Plaintiff. However, because claims against all "Company Parties" are subject to arbitration under the Hardings' contract with the Diamond U.S. Collection (further discussed in the Motion below), the proper place for these defendants to raise these arguments will be in the arbitration forum selected by the operative Purchase Agreement with Diamond U.S. Collection (as well as in the previous purchase agreements) executed by the Hardings. But by joining Diamond U.S. Collection in seeking to compel arbitration, no defendant is waiving its arguments that it is not a property party to Plaintiffs' suit, or any other defense.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is the wrong venue for the claims asserted by Ilona Harding and Thomas Lester Harding ("Plaintiffs") against the Diamond Resort Companies. Plaintiffs allege a series of claims stemming from their purchase of timeshare interests via various purchase agreements entered into over the years—agreements in which they agreed to arbitrate any legal claim, dispute, or controversy they may have against these companies. Most recently, on December 12, 2015, both Hardings signed a purchase agreement ("the December 2015 Agreement") with Diamond Resorts U.S. Collection Development, LLC. ("Diamond U.S. Collection"). *See* Exhibit 1, La Luzerne Decl., ¶¶ 8-9 & attached Ex. A, § 18. This is the current, operative agreement governing the Hardings' vacation ownership, and it controls the adjudication of the claims brought against Diamond U.S. Collection and the other Company Parties named in this litigation that seek damages, rescission of the Hardings' agreements, restitution of all monies they had paid under the agreements, and their costs and fees. *See, e.g.*, Compl. at 54 (Prayer for Relief).[3]

These remedies are also available through individual arbitration. Arbitration provides an efficient and economical forum for assessing the Hardings' claims and analyzing their unique factual allegations, and more importantly, is the forum in which the Hardings agreed their disputes would be adjudicated. Thus, while the Diamond Resort Companies deny the allegations in Plaintiffs' complaint and stand ready to defend themselves (and, for the parties improperly named, to move for dismissal on those grounds (*see* n.1, *supra*)), the proper forum in which to assert those defenses and bring such motions is in the individual arbitration proceedings agreed to by the Hardings, as further detailed below. Because (1) there is a binding arbitration provision governed by the Federal Arbitration Act ("FAA"), and (2) the broad scope of the arbitration provision encompasses the Hardings' claims against the Diamond Resort Companies, this Court

[3] As to the other purchase agreements the Hardings entered into with any of the named Defendants, each of those agreements contained an arbitration provision identical to that in the December 2015 Agreement. *See* Luzerne Decl., Ex. C (January 29, 2013 Purchase Agreement), § 18; Ex. D (August 12, 2013 Purchase Agreement), § 18; and Ex. E (August 19, 2015 Purchase Agreement), § 18.

should compel the Hardings to arbitrate their disputes on an individual basis. Indeed, the Court has no discretion to do otherwise, given the facts and law discussed below. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (on a motion to compel arbitration, the court's role under the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue."); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

For the reasons further detailed below, this action should be stayed pending the completion of the arbitration procedings to which the Hardings agreed, or should be dismissed pursuant to Rule 12(b)(6) for failing to state a claim that can be pursued in this litigation forum.

II. FACTUAL BACKGROUND

A. Diamond Resorts Companies

Diamond is a global leader in the hospitality and vacation ownership industry, with a worldwide resort network of 379 vacation destinations located in 35 countries throughout the world, including the continental United States, Hawaii, Canada, Mexico, the Caribbean, Central America, South America, Europe, Asia, Australia, New Zealand and Africa. *See* Luzerne Decl., ¶ 3. Diamond's resort network includes over 100 resort properties with approximately 12,000 units managed by Diamond companies, as well as 250 affiliated resorts and hotels and 20 cruise itineraries. *Id.*

Diamond offers a vacation ownership program whereby members acquire vacation ownership interests (VOIs) in the form of points. *Id.*, ¶ 4. Members receive an annual allotment of points depending on the number of points purchased, and, through various Clubs, they can use these points to book stays at destinations within the network of resort properties discussed above for themselves and/or their guests. *Id.* Thus, unlike a traditional interval-based vacation ownership product that is linked to a specific resort and week during the year (i.e., two weeks each year in calendar weeks 10-11 anchored to one property), Diamond's points-based system permits members to maintain flexibility relating to the location, season, and duration of their

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vacations. *Id.*[4]

B. The Hardings' Relationship With Diamond

Ilona Harding and Lester Harding (the "Hardings") were already timeshare points owners when they came to Diamond through Diamond's acquisition of Monarch Grand Vacation's assets when that competitor declared bankruptcy. The Hardings opted to become direct timeshare owners with Diamond on December 31, 2012, when they chose to transfer their membership points from Monarch Grand Vacations to Diamond. *Id.*, ¶ 6.

Over the course of their timeshare ownerships with Diamond, and in the course of less than four years, the Hardings used their ownership benefits for either themselves or friends and family **one hundred and forty-nine (149) nights** at a variety of Diamond's properties. *Id.*, ¶ 7. During some of their stays, the Hardings elected to attend optional sales events that promoted Diamond properties and other timeshare opportunities. *Id.*, ¶ 8. After attending some of these events, the Hardings opted to entered into several different agreements with Diamond entities, most recently in December 2015, when they made their latest purchase. *Id.*

On December 12, 2015, the Hardings entered into an agreement with Diamond U.S. Collection in which the Hardings purchased a membership in the Diamond Resorts U.S. Collection Members Association. *Id.*, ¶ 9, & attached Ex. A. The Hardings had the right to revoke the entire December 2015 Agreement at any time within five (5) days of executing that purchase agreement, **but did not do so**. *See id.*, ¶ 11-12; *see id.*, Ex. A, § 21(b) (Recission Rights). Instead, after execution of the December 2015 Agreement, the Hardings continued to make use of their vacation property ownership with stays up through August 2016. *Id.*, ¶ 15. Specifically, they used ownership benefits at various Diamond resorts for thirty-three (33) nights after December 12, 2015, reserving rooms in their own names for twenty-one (21) nights, and reserving rooms in other persons' names for an additional twelve (12) nights, until on August 15,

[4] Plaintiff's Complaint smears Diamond (and the timeshare industry) with allegations that make the Diamond Resort Companies appear to be the lowest and greediest kind of predatory company that defrauds consumers and offers no value to them. This characterization is flat wrong. However, since the merits of the claims asserted are irrelevant to the assessment of a motion to compel arbitration, Diamond has provided only the most basic outline of its business and will reserve the fuller accounting for the arbitrator that will be adjudicating Plaintiffs' claims.

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2016 they cancelled a four-day reservation at the Polo Tower Suites in Las Vegas, Nevada, that was scheduled to begin the next day. *See id.*[5]

C. The Arbitration Provision

The December 2015 Agreement contains an arbitration provision that is far from hidden; indeed, it constitutes a little more than 1 page of text in the 9-page agreement, and is clearly labeled: "**ARBITRATION PROVISION**" (Luzerne Decl., Ex. A, § 18). The provision allows for claims to be brought, at the Purchaser's election, either with the American Arbitration Assocation ("AAA") or the National Arbitration Forum ("NAF") (*see id.*, § 18(b)), and specifies that a neutral arbitrator is to be selected within 60 days of a request for arbitration. *Id.*, § 18(c). The costs and fees of arbitration are to be borne by the Diamond Resort Companies against which claims are asserted, and Diamond also agreed to pay fees and expenses of the Purchaser's attorneys if the claim is resolved in the Purchaser's favor. *Id.*, § 18(d). Any in-person hearing will be held at a place deemed fair and convenient to Purchaser by the claims administrator. *Id.*

The arbitration provision also includes an opt-out clause, which gave the Hardings the right to opt-out of the arbitration provision (without affecting the rest of the agreement) at any time within thirty (30) days of execution. *See id.*, ¶ 13 & Ex. A, §18(a) ("Opt-Out Right"). This bolded and capitalized initial section of the arbitration provision clarified that the Hardings could send written notice within thirty (30) days of execution of the agreement of any desire not to be bound to arbitration in the event any disputes arose. *See id.* While Diamond Resorts honors (as required by contract) any opt-outs received within thirty (30) days, the Hardings did not provide such notice in the specified timeframe. *See* Luzerne Decl., ¶ 14.[6]

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[5] On October 6, 2016, the Hardings also cancelled a reservation they had made for a friend/family member, and then days later, their attorney sent the demand letter that preceded this putative class-wide litigation. *See* Luzerne Decl., Ex. B.

[6] Instead, "notice" was sent only after Plaintiffs retained counsel in October 2016, who then sent a purported "opt-out letter" seeking to opt-out of the arbitration provision **over 300 days after the Hardings signed the December 2015 contract**, and years after execution of the other purchase agreements with the Diamond U.S. Collection. *See* Luzerne Decl., ¶ 16-19. This "opt-out" was not within the time frame provided for such actions, and is thus invalid. *See id.*

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The "Claims" that must be asserted in arbitration are broadly defined to encompass "any legal claim, dispute, or controversy between any Company Party and Purchaser, including statutory, contract, and tort disputes of all kinds and disputes involving requests for declaratory relief, injunctions or other equitable relief." *Id.*, Ex. A, § 18(b) (Arbitration Terms Defined). Further, the Arbitration Provision defines "Company Party" to include not just Diamond U.S. Collection (the "Seller"), but all of its affiliated companies (which would include each defendant in this action, which are all Diamond Resorts entities). *See id.* The only exception to the requirement on each party to arbitrate would be for claims brought in small claims court, or for challenges to the arbitration provision's requirement that disputes must be pursued individually, and not on behalf of a putative class. *Id.*

The December 2015 Agreement's arbitration provision is specifically governed by the Federal Arbitration Act ("FAA"). *Id.*, § 18(e). It also prevents the Hardings from asserting their claims in classwide proceedings, requiring individual arbitration for any disputes. *Id.*, § 18(g-h).

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

D. The Hardings' Complaint

On February 1, 2017, the Hardings filed this action against the Diamond Resort Companies via a purported Class Action Complaint making claims under the Nevada Deceptive Trade Practices Act (Compl., ¶¶ 149-165), claims of common law fraud and negligent misrepresentation (Compl., ¶¶ 166-176), and a claim of breach of the implied covenant of good faith and fair dealing (Compl., ¶¶ 177-181). They assert these claims on behalf of a putative class of all persons who were at least 60 years old when they purchased a Diamond Resorts timeshare ownership and "who have not received a full refund of monies or other consideration they paid the Defendants" (Compl., ¶ 141). Their complaint makes various assertions about the experiences they presume persons other than themselves had. As to the Hardings' own claims, they primarily allege they were duped and/or pressured into entering into the purchase agreements they executed with Diamond, and that their vacation ownership is not satisfactory or as promised. They seek, in recovery, various remedies including restitution of all funds they had paid under those agreements. The Hardings demand a jury trial for their class action claims. *See* Compl., at 55).

III. LEGAL ARGUMENT

A. Arbitration Agreements are to be Enforced, Absent a Generally Applicable Defense

The individual arbitration provision to which the Hardings agreed controls here, and no litigation—let alone a classwide litigation—may proceed in light of that section of the Purchase Agreement. "Because arbitration is fundamentally a matter of contract, the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir.2011). And because the FAA reflects a strong policy favoring arbitration of disputes, arbitration provisions governed by the FAA are to be liberally enforced. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1. Indeed, contracts to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996). Indeed, as this Court has recognized, "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Larson v. D. Westwood, Inc.*, 2016 WL 5508825, at *1 (D. Nev. Sept. 27, 2016) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). *See also Republic of Nicar. v. Std. Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991) ("The standard for demonstrating arbitrability is not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the Act is phrased in mandatory terms.").

The FAA-governed arbitration provision dictates that Plaintiffs' claims against the Diamond Resort Companies here must proceed in an arbitration administered by either the AAA or the NAF, in accordance with a consumer-friendly provision under which Diamond bears the expenses and costs of the arbitration as well as Plaintiffs' reasonable attorneys' for any claim on which they succeed in arbitration, as detailed in the agreement. *See, generally*, Luzerne Decl., Ex. A, § 18. Section 3 of the FAA provides that, when a plaintiff sues "upon any issue referable to arbitration under an agreement in writing for such arbitration," the court "shall" stay the action until arbitration is completed in accordance with the terms of the parties' agreement. *See* 9

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LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

U.S.C. § 3.[7] Section 4 of the FAA, in turn, empowers the court to compel arbitration according to the parties' agreement. *See* 9 U.S.C. § 4.

B. No Generally Applicable Contract Defense Invalidates The Arbitration Provision At Issue Here

If a court is satisfied "that the making of the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. §4. "The FAA thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Parties opposing a motion to compel arbitration are required to show that a defense generally applicable to contracts should prevent enforcement of the arbitration provision. *See Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (contracts to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). And as the Supreme Court has made clear, the only valid type of challenge under Section 2 of the FAA to an arbitration provision is one that "specifically challenges the validity of the agreement to arbitrate". *See Rent-A-Ctr.*, 561 U.S. at 70:

Diamond is unclear what challenges to the arbitration provision Plaintiffs may attempt to assert in Opposition to this motion, as no such defense validly applies here. For example, often consumers opposing motions to compel arbitration argue that the arbitration provision is somehow unconscionable. A finding of unconscionability requires a finding that both procedural and substantive unconscionability exist as to the arbitration provision. *See Miceli v. Citigroup, Inc.*, 2016 WL 3749698, at *3 (D. Nev. July 13, 2016) ("Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a clause as unconscionable.") (applying Nevada Law and citing *D.R. Horton,*

[7] Further, while a district court may opt to stay an action pending the arbitration, the Ninth Circuit has long held that when an arbitration clause is broad enough to bar all of a plaintiff's claims from litigation, and requires all claims to be submitted to arbitration, the trial court may dismiss the complaint for failing to state a viable claim. *See, e.g., Sparling v. Hoffman Const. Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988) (trial court did not err in dismissing claims that plaintiff had agreed to submit to arbitration).

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004)). Here there is no question that the arbitration provision is neither procedurally nor substantively unconscionable.

First, the arbitration provision gives purchasers a thirty (30) day window during which they can opt-out of the requirement to arbitrate disputes (*Id.*, § 18(a)("Opt-Out Right"), which ensures that there is no procedural unconscionability here. *See, e.g., Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) (no procedural unconscionability when employee had the opportunity to opt-out of the Circuit City arbitration program within 30 days by mailing in a form); *see also Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1211 (9th Cir. 2016) (finding that a right to opt-out of arbitration within 30 days, either in-person or by overnight mail, rendered the Uber arbitration clause procedurally conscionable). Second, there is no question that the arbitration provision at issue here is extremely consumer-friendly: Diamond agrees to cover all arbitration fees, to hold any arbitration proceeding at a location reasonably convenient to the Hardings, and even to pay the reasonable/fees and expenses of the Hardings' attorneys for claims resolved in their favor. *Id.*, § 18(d). Thus, there is no substantive unconscionability here to prevent application of the arbitration provision. *See, e.g., Pruter v. Anthem Country Club, Inc.*, 2013 WL 5954817 (D. Nev. Nov. 5, 2013)(compelling arbitration and finding no substantive unconscionability where employer would bear costs of the arbitration).

The Diamond Resort Companies, as noted above, are unsure of why Hardings will claim that they are not bound to individually arbitrate their disputes when they signed a purchase agreement containing a clear arbitration provision, and did not opt-out of that provision in the time provided. Thus, rather than speculate, Diamond will wait to address in its Reply any arguments Plaintiffs may raise.

IV. CONCLUSION

The Hardings are bound to arbitrate their own individual disputes, and are pursuant to the arbitration provision to which they agreed, are barred from litigating on a classwide basis the harms they claim to believe other unspecified persons have suffered. Upon finding that a plaintiff's claims are subject to an arbitration clause, the Court must compel arbitration. *See* 9 U.S.C. § 2. However, in this circuit, the court may also opt to dismiss an action without prejudice instead of staying the action while the arbitration proceeds. *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988); *Stewart v. Dollar Loan Ctr.*, LLC, No. 2:13-cv-0182-JCM-PAL, 2013 WL 3491254, at *4 (D. Nev. July 10, 2013).

Thus, the Diamond Resort Companies ask the Court (1) to compel the Hardings to arbitrate according to the terms of the arbitration provision, and (2) to either stay this action pending that arbitration, or to dismiss this action because the Hardings' claims are subject to an arbitration clause.

DATED this 3rd of April, 2017.

SNELL & WILMER L.L.P.

By: /s/ John S. Delikanakis
John S. Delikanakis
Nevada Bar No. 5928
Joshua D. Cools
Nevada Bar No. 11941
3883 Howard Hughes Parkway, Ste. 1100
Las Vegas, NV 89169

Attorneys for Defendants

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in this action. On this date, I caused to be served a true and correct copy of the foregoing **DIAMOND RESORTS COMPANIES' MOTION TO COMPEL PLAINTIFFS TO ARBITRATION AND TO STAY OR DISMISS THIS ACTION** by the Court's CM/ECF Program.

DATED this 3rd day of April, 2017.

/s/ Tonya C. Stephenson
An Employee of Snell & Wilmer L.L.P.

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